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96 207 AUG 6 1996

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROSA SALYER AND OTHERS SIMILARLY SITUATED,
Petitioners

v.

OHIO BUREAU OF WORKERS' COMPENSATION
AND WES TRIMBLE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether under the Fair Labor Standards Act the Bureau of Workers' Compensation ["Bureau"] is an "employer" of Mrs. Salyer, and caregivers such as Mrs. Salyer.

2) Whether under the Fair Labor Standards Act Mrs. Salyer, and caregivers such as Mrs. Salyer, are "employees" (*i.e.* an individual who is "employed," 29 U.S.C. §203(e)), of the Bureau of Workers' Compensation.

3) Whether the duties performed by Mrs. Salyer, fall within the definition of "companionship services" and thus are within the "companionship services" exemption to the Fair Labor Standards Act, 29 U.S.C. §213 (a)(15).

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A. Rosa Salyer, et a.l, v Ohio Bureau of Workers' Compensation and Wesley Trimble, Administrator, United States Court of Appeals Case No. 95-3531
B. Rosa Salyer, et al., v. Ohio Bureau of Workers' Compensation, et al., Case No. C2-94-814

Petitioner Rosa Salyer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on May 17, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit dated May 17, 1996, is reported at 83 F.3d 784. It is reprinted in the appendix hereto, appendix p. 1.

The order of the United States District Court for the Southern District of Ohio (Graham, J.) has not been reported. It is reprinted in the appendix hereto, appendix p. 16.

JURISDICTION

This is an appeal from the judgment of the Court of Appeals for the Sixth Circuit, dated May 17, 1996. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

The statutes and administrative provisions involved are set forth in the appendix. They are: 29 U.S.C. §203(e)(1), 29 U.S.C. §203(g), 29 U.S.C. §213(a)(15), 29 C.F.R. §552.6, Ohio Revised Code 4123.66(a), Ohio Administrative Code 4123-7-25(F)(5).

STATEMENT OF THE CASE

A. BASIS FOR FEDERAL JURISDICTION

This case was brought in the District Court under federal question jurisdiction for violations of the overtime and minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §206(a) and 207(a). The Complaint alleged that there was a violation of the Fair Labor Standards Act, and that the Bureau of Workers' Compensation was an employer for Fair Labor Standards Act purposes. The District Court had jurisdiction pursuant to 28 U.S.C. §1331.

Defendant, Bureau of Workers' Compensation, filed a motion to dismiss, which the Court converted to a motion for summary judgment pursuant to Fed. R. Civ. P.12(b)(6).

After discovery was conducted, by order dated April 14, 1995, the District Court granted the Bureau's motion and dismissed the case.

Appeal was brought to the Sixth Circuit Court of Appeals from the District Court's decision dismissing the action and granting defendant's motion for summary judgment. The district court's order was filed April 14, 1995. The Notice of Appeal was timely filed on May 2, 1995. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

B. STATEMENT OF FACTS

This case involves provision of nursing services, referred to as caregiver services, (Shively 1st depo. Tr. p. 17) to Auburn Salyer by his wife, Rosa Salyer. Mrs. Salyer has been providing these services since Mr. Salyer suffered an injury in a 1969 industrial accident, which was covered under the Ohio Workers' Compensation Law. Defendant, Bureau of Workers' Compensation ("Bureau") has been paying her for these services. (Salyer depo. Tr. p. 14, 15, 26, 27).

Mr. Salyer is "permanently and totally disabled." This means that his injury has rendered him incapable of working. Mr. Salyer "was awarded permanent and total disability in 1974 . . . [because] he cannot work" (Shively depo. 2d Tr. p. 6, 7; see also Ohio Revised Code § 4123.58).

Caring for Mr. Salyer is a 24 hour a day job (Salyer depo. Tr. p. 33), based on Mr. Salyer's need for 24 hour care as a result of his industrial injury (Salyer depo. Tr. p. 45). This need for 24 hour care involves both periods of actually doing things (9 to 10 hours) for Mr. Salyer, and periods of waiting to provide assistance (Salyer depo. Tr. p. 60, 61).

These services are paid for by the Bureau of Workers Compensation at a rate of $24/day (Shively depo. 2d Tr. p. 9; see also Shively depo. Ex. 1, p. 2). This rate is set by the Bureau, it is not negotiated (Shively depo. 2d Tr. p. 9, 10).

1. The Bureau's Procedures

The Bureau has adopted policies, which it follows in approving or disapproving nursing care such as that provided by Mrs. Salyer. (Shively depo. 1st Tr. p. 21, 22, 24; see also Shively depo. ex. 2, 3, and 4).

The Bureau of Workers' Compensation's "Medical Management Cost Containment Division" is "responsible for authorization of the home nursing caregiver services" (Shively 1st depo. Tr. p. 15, 16). That Division of the Bureau

> . . . will review the request from the physician, *evaluate if there is enough medical documentation* to permit caregiver services, *determine if it's medically necessary* for the allowed condition only, *and then make a decision on the caregiver services.*
>
> (Shively depo. 1st Tr. 19, emphasis added.)

The amount paid the caregiver is set by a claims examiner, a Bureau employee, who works in the Medical Management Cost Containment Division. (Shively, depo. 1st Tr. p. 44, 45).

The claims examiner does not discuss the amount to be paid with Mr. or Mrs. Salyer, or the doctor.

The determination of the amount to be paid occurred as follows:

> . . . There was a schedule, if you will, depending on the care that was required by the injured worker. There was, in association with each level of payment, rate ranges. So depending on whatever level of care, *the claims examiner would look at the rate range for that level and offer reimbursement somewhere in that range.*
>
> (Shively, depo. 1st Tr. p. 45, 46, emphasis added.)

The amount paid is determined by the Bureau — neither the injured worker, nor the treating doctor has a say. (Shively, depo. 1st Tr. p. 47).

A Bureau reviewing nurse determines which level of care applies. (Shively, depo. 1st Tr. p. 46).

The Bureau pays the caregiver directly. (Shively, depo. 1st Tr. p. 52; see also Shively depo. 2d Tr. p. 26 and Shively depo. ex. 1, p. 21).

Although the Bureau of Workers' Compensation argued that Mr. Salyer is the employer, the evidence discussed above demonstrates that it is the Bureau that is the employer.

Further evidence that Mr. Salyer is not the employer is that he could not even request provision of services (Shively depo. 1st Tr. p. 25). A request must first be made by the treating physician.

Nor is a request by the treating physician sufficient — the Bureau first reviews and determines whether it will authorize payment (Shively depo. 1st Tr. p. 25-27).

Even where the request is related to the allowed condition, and medically necessary, the doctor has to request the Bureau to authorize services. (Shively depo. 1st Tr. p. 27). Further, the Bureau does not automatically approve payment because it is requested by the doctor (Shively depo. 1st Tr. p. 27).

The Bureau has a Bureau nurse review the file. If the nurse believes that the medical evidence is insufficient, or does not support the request, the nurse will have a doctor, who also works for the Bureau, review the file (Shively depo. 1st Tr. p. 32). Whether or not the provision of nursing care will be approved depends on the decision of that Bureau reviewing doctor (Shively depo. 1st Tr. p. 33).

The reviewing physician may deny the request even if the treating physician feels that the services are medically necessary and related to the condition (Shively depo. 1st Tr. p. 42). Nor can the injured worker authorize payment (Shively depo. 1st Tr. p. 43).

Once payment is authorized, it does not continue automatically. The Bureau periodically reviews the claims to determine whether to continue payment (Shively depo. 1st Tr. p. 40).

Nor does Mr. Salyer have the ability to hire who he wants. The Bureau indicated that if Mrs. Salyer were not providing this care, Mr. Salyer "would not be able to hire anyone in his family or any other friend or self-employed person. It would be an aide or attendant employed by a home health agency." (Shively depo. 1st Tr. p. 83).

The caregiver is not expected to provide any equipment in order to provide services. The Bureau pays for the necessary equipment (Shively depo. 1st Tr. p. 71):

Q. Is there any kind of equipment that you actually had to purchase to care for your husband?

A. No.

Q. Would any kind of equipment that your husband currently uses, such as his port-a-pot or his bed, for example, was that paid for by the Bureau of Workers' Compensation?

A. Yes.

(Salyer depo. Tr. p. 41; see also Salyer depo. Tr. p. 63).

2. Ohio Administrative Code, Section 4123-7-25

Further support for the fact that the Bureau is the actual employer of these nurses is contained in Ohio Administrative Code ("OAC") 4123-7-25. That code section provides that the Bureau has to approve of such services, prior to the rendering of such services. OAC 4123-7-25(F)(3). If they do not approve, payment will not be made. OAC 4123-7-25(F)(5) indicates that the Bureau determines what fees are paid:

> Reasonable *fees* for a non-licensed claimant's spouse *shall be determined by the bureau's medical section* . . . [Emphasis added]

The Bureau, prior to authorization, may require an examination of the home situation, and the need for care:

> Where . . . the need for such services is not apparent, *a home visit* to claimant's home *shall be made* . . . for assessment. . . *Requests may be denied* if the information [resulting from the visit] does not justify the need for nursing care . . . [OAC 4123-7-25(I), Emphasis added]

3. Mrs. Salyer's Job Duties

Mrs. Salyer helps Mr. Salyer in ways which are medically necessary. As discussed above, they are approved by the Bureau only after being requested by a treating doctor, and approved by the Bureau after a medical review.

Mrs. Salyer helps Mr. Salyer dressing, bathing, gives him his medication, bathes him, and also cleans up after him because of his incontinence. (Salyer depo. Tr. p. 18-21).

The Physician's evaluation report, dated January 26, 1993, (Shively depo Ex. 1, p. 11), indicates that Mr. Salyer needs help bathing, dressing, feeding, transportation, transfer and locomotion.

The Bureau would not authorize payment for companionship services:

> by BWC rules the following tasks DO NOT constitute nursing care: maintenance of household, preparing meals, washing clothes, running errands, child care, etc. Nursing services shall include, but not be limited to: manual feeding, bathing, toileting, dressing, transferring, transporting, administering medications and/or treatments, and/or caring for a mentally incompetent claimant.
>
> [Ltr from BWC, dated March 31, 1993, Shively depo ex. 1, p. 8]

Only certain items will be authorized — "if the physician would request only for someone to prepare meals and wash clothes, the Bureau would deny that because it is not nursing care." (Shively depo. 1st Tr. p. 56).

If Mrs. Salyer did not provide the services she provides, they would have to be provided by "an aide or attendant em-

ployed by a home health agency." (Shively depo. 1st Tr. p. 83). These attendants would be paid differently — at least $5 per hour. (Shively depo. 2d Tr. p. 12-13). Thus, if not for caregivers such as Mrs. Salyer, the Bureau would be required to pay more money for provision of such services.

REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES IMPORTANT POLICY QUESTIONS REGARDING THE FAIR LABOR STANDARDS ACT: 1] WHAT IS THE MEANING OF THE TERM "EMPLOY" UNDER THE FAIR LABOR STANDARDS ACT; AND 2] WHAT IS THE SCOPE AND APPLICATION OF THE "COMPANIONSHIP SERVICES EXCEPTION" TO THE FAIR LABOR STANDARDS ACT.

A. The Word "Employ" under the Fair Labor Standards Act Is Broad and When Applied to the Present Case Compels the Conclusion That the Bureau Is the Employer.

1. The broad definition of "employ".

The question involved in this case is whether caregivers such as Mrs. Salyer are "employees" of the Bureau, under the Act. The Act defines "employee" as an individual who is "employed." 29 U.S.C. §203(e). The Act further defines "Employ" as "to suffer or permit to work." 29 U.S.C. §203(g).

Because the facts demonstrate that the Bureau "suffer(s) or permit(s)" Mrs. Salyer to work, the Bureau is the employer.

The Fair Labor Standards Act definition of employer is significantly broader than the common law definition. *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (CA5 1976), *cert. den.* 429 U.S. 826 (1976). The FLSA definition "is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (CA9 1983).

The definitions in the FLSA are given liberal construction:

> The FLSA is designed to be "a broadly remedial and humanitarian statute." We thus "construe[] the Act's definitions liberally to effectuate the broad policies and intentions of Congress."
>
> *Fegley v. Higgins*, 19 F.3d 1126, 1132 (CA6 1994) [citations omitted.]

2. The "economic reality" test

The facts demonstrate that the Bureau is clearly an employer in this case because, as a matter of economic reality, that the Bureau controls the employment relationship.

The test applied to determine who is the employer is the "economic reality" test. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286 (CA3 1991).

The factors to be considered in determining if an employment relationship exists "are not etched in stone and will not be blindly applied." *Bonnette* at 1470. Each case requires careful examination into the nature of the relationship between the employees and alleged employers, and the entire employment situation, rather than isolated factors, determines whether an employer/employee relationship exists. *Rutherford* at 730. "No individual factor is determinative, but rather the totality of the relationship must be the basis of decision." *Luther v. Z. Wilson, Inc.*, 528 F.Supp. 1166, 1169 (SD OH 1981).

The "economic reality" test demonstrates that the Bureau is the Employer because it has "complete economic control over the relationship." *Bonnette* at 1470.

The Bureau controls whether the caregiver will be paid. If they do not authorize payment, the caregiver will not be paid,

regardless of what the injured worker wants. The Bureau, not the injured worker, controls the level and amount of payment.

The Bureau suffers these caregivers to work and takes advantage of them — to the financial advantage of the Bureau. If these services were not provided, the Bureau would have to hire someone from a home health agency to provide such services at a higher fee.

Because the facts demonstrate that the Bureau establishes and controls the terms and conditions of employment, and suffers the caregivers to work, the Bureau is the Employer.

The Court of Appeals assumed, without deciding, that the Bureau was an employer. Because it ruled that the "companionship services" exception (discussed below) applied, the Court of Appeals did not rule on the issue of whether or not the Bureau was an employer for purposes of the Fair Labor Standards Act. As a result, the District Court's decision that the Bureau was not a Fair Labor Standards Act employer was left standing.

This decision is incorrect.

The District Court's application of the economic reality test in its decision is flawed because the District Court failed to consider that the totality of circumstances demonstrates that the Bureau determines whether to pay, how much to pay and what to pay for.

3. Application of the "economic reality" test demonstrates that the Bureau is the employer.

The Bureau is the employer under the FLSA definition of one who "suffers" an employee to work.

The facts also demonstrate that any claim that Mr. Salyer is the employer must be a subterfuge: Mr. Salyer is, by definition, incapable of working because he is permanent total, the only money he receives comes from the Bureau..

Nursing care payments are made directly to the provider from the Bureau.

Furthermore, under the Bureau's procedure the injured worker cannot request caregiver services, the injured worker cannot authorize payment for services, and the injured worker cannot determine the amount paid.

The "economic reality" test demonstrates that the Bureau is clearly the employer: The Bureau controls the payment, and the amount paid; has the power to hire and fire through their ability to authorize or refuse authorization of payment; controls the conditions of employment because it determines what can and cannot be done. Mrs. Salyer has no opportunity for profit or loss, because she is an employee; similarly, she has no investment in equipment.

(a) The Bureau sets the rate paid, without negotiation

The Bureau sets the amount paid and pays the caregiver directly [see Ohio Administrative Code 4123-7-25(F)(5) which indicates that "*fees* for a non-licensed claimant's spouse *shall be determined by the bureau's medical section.*"]

The party with control over the pay rates, and the method of payment, as a matter of "economic reality" is the employer. *Real* at 756; *Martin v. Albrecht*, 802 F.Supp. 1311 (WD Pa. 1992).

(b) The Bureau has the power to hire and fire.

The Bureau has the ultimate control over whether home care givers such as Mrs. Salyer could be hired. The Bureau determines the eligibility of workers' compensation claimants for their services, and whether payment will be made. *see Griffen and Brand, supra*

In addition, as a matter of economic reality, the Bureau possesses the ultimate power to terminate the employment relationship between an injured worker and a caregiver. If the Bureau determines that an injured worker is no longer eligible for health care services, payment will no longer be made. *see, e.g. Real* at 756.

The power to hire and fire is an indicator of employment. *see Real* at 755, 756; *Arnheim & Neely* at 610. This is true whether or not such power is exercised. *Griffen and Brand, supra.*

(c) The Bureau controls the conditions of employment.

The Bureau determines for each recipient in the program the tasks that can be performed for such recipient by the provider. Thus, the Bureau has the ultimate control of the work situation. *see Griffen and Brand* and *Okada.*

Even assuming *arguendo* that the injured worker "supervises" the caregiver in the performance of their daily duties, this does not mean that the Bureau is not an employer. A party is a joint employer "[a]lthough [it] exercises little direct supervision over [the employees'] work" where it "determine[s] the form of the working relationship between the [employees] and [the party directly supervising them]." *Real* at 756.

(d) Mrs. Salyer has no Opportunity for profit/ loss and no investment.

Mrs. Salyer has no investment in the provision of health care. She has neither a risk of loss, nor an opportunity for profit. *Luther* at 1170. This indicates that she was not an independent contractor, but an employee. *Brock v. Superior Care Inc.* (CA2 1988), 840 F.2d 1054.

All necessary equipment is provided by the Bureau. A caregiver such as Mrs. Salyer is not expected or required to

provide any equipment. This also demonstrates the caregivers dependence on the Bureau. *Usery* at 1314.

(e) The Bureau provides the funds.

Mrs. Salyer is completely dependent economically on the Bureau. *see Real* at 756. "The Act is designed to protect individuals whose employment status is so dependent on the whims of the employer as to make them submissive to an employer's notion of fair compensation for their labor." *Usery* at 1315.

It is pure folly for the defendants to assert that an individual such as Mr. Salyer, who is permanently and totally disabled — and therefore by definition not capable of sustained remunerative employment, is the individual to whom Mrs. Salyer must look for her economic sustenance.

4. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (CA9 1983), demonstrates that the Bureau is the employer.

This case is factually similar to *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (CA9 1983).

In *Bonnette*, as in the present case, in-home workers provided services to individuals who needed them.

In *Bonnette*, the Court held that the State was the actual employer -- even though in *Bonnette* the workers were actually paid by the recipient, who was reimbursed by the government. By contrast, the present case is even a stronger one for finding the Bureau to be the employer because in the present case the workers are paid directly by the Bureau.

5. The evidence contradicts the District Court's reasons for finding the Bureau to not be an employer.

The Bureau of Workers' Compensation has an obligation under the law to provide care for injured workers such as Mr. Salyer. *see* Ohio Constitution Art. II, Sec. 35, R.C. 4123.66(a).

It has chosen to provide such service through the spouse caregiver, Mrs. Salyer.

The Bureau controls and approves of payment for such services, and makes payment directly to the caregiver. Mr. Salyer does not pay Mrs. Salyer — the Bureau does.

If there were no spouse caregiver, the Bureau would be obligated to pay a third party or a nursing home; it would pay the third party more than it pays Mrs. Salyer.

The Bureau avoids these obligations by using a spouse caregiver. Thus, although the District Court says at p. 10 of its decision that Mrs. Salyer does not perform anything which benefits the Bureau, if Mrs. Salyer did not provide these services to Mr. Salyer, the Bureau would have to pay more to someone else.

By employing Mrs. Salyer — and paying her below the amount required by the FLSA, the Bureau saves money.

The District Judge confused Bureau of Workers' Compensation obligation to provide for the care with the method they have selected to fulfill the obligation.

Although the District Court says at p. 10 of its decision that "BWC merely makes funds available to plaintiff's husband, thereby enabling plaintiff's husband to compensate plaintiff for her caregiver services" and at p. 11 that "the benefits are due to plaintiff's husband, but are paid directly to plaintiff for purposes of convenience," this is contrary to the facts as set forth above.

Mr. Salyer has no say over whether funds would be paid, or how much would be paid. He can not authorize payment. He can not even request payment under the Bureau's rules.

Additionally, the District Court's decision incorrectly indicated that the injured worker could hire or arrange for care, and that the injured worker had the sole right to terminate the caregiver.

The facts actually demonstrate that the injured worker can only hire or arrange for care subject to review and approval by the Bureau. If the Bureau determines to deny payment, there is nothing the injured worker can do. Similarly, payment is not automatic. If the Bureau determines that care is no longer necessary, it will terminate authorization — thereby resulting in termination of the caregiver's employment.

Although the District Court says at p. 10 of its decision that "The BWC is in essence a government-managed insurance company. The BWC is not in the business of providing health care services." Whether the Bureau is in the business of providing health care is not the issue. The issue is whether they suffer people such as Mrs. Salyer to work — and thus become the employer — as part of fulfilling their statutory duty of providing health care services to injured workers.

Because the totality of the relationship must be considered, the Bureau's attempt to label Mrs. Salyer an independent contractor is irrelevant. Defendants in FLSA cases typically attempt to avoid liability by designating an employment relationship as an independent contractor situation. To accept the District Court's finding at p. 8 of its decision that the label attached by the Bureau is a factor would be to encourage subterfuge by employers seeking to avoid FLSA liability.

The determination of the status under the Act is not bound by the Bureau's characterization of the relationship. "Putting on an `independent contractor' label does not take the worker from the protection of the act." *Rutherford* at 729; *see also Real* at 755; *Usery* at 1311.

The notification of caregiver services form cited by the Bureau in the District Court was drafted by the Bureau (Shively depo. 1st Tr. p. 89, 90; Luchs depo. 2d Tr. 9). The Bureau referred to this document as a contract in the lower court, but it is not a contract. It is titled "Notification of Caregiver Service Payments being Reported to the Internal Revenue Service." This form was drafted by the Bureau "to make sure that the caregiver

understands the obligation for payment of taxation" (Shively depo. 1st Tr. p. 90), not as a contractual determination of status.

However, even assuming *arguendo* that it were a contractual determination of status, it would still be irrelevant because "an employee is not permitted to waive employee status." *Robicheaux v. Radcliff Material Inc.*, 697 F.2d 662, 667 (CA5 1983). Even were a contract to label Mrs. Salyer as an independent contractor, it would be irrelevant because:

> That contractual language [labeling an employee as an independent contractor], however, is not conclusive in the circumstances presented here. Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.
>
> *Real* at 755. [Bracketed material added.]

The subjective intent of the parties does not define the employer-employee relationship, and the employer's good faith belief that it is not the employer is no defense. *Brennan v. Partida*, 492 F.2d 707, 709 (CA5 1974); *Schultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267, 1273 (CA10 1970).

Thus the fact that the Bureau has gone to great lengths to avoid being labeled as an employer in no way effects its status as such. Rather, the Court must look to the "economic reality" of the relationship between the Bureau and Mrs. Salyer.

Although the District Court found in its decision that Mr. Salyer, not the Bureau, was the employer, it ignored the fact that, assuming *arguendo* that Mr. Salyer may be an employer, the Bureau may also be an employer for FLSA standards because the existence of an independent

> party . . . standing in the position of an employer of certain workers does not as a

> matter of law negate the possibility that [another party] may be a joint employer of those workers under the FLSA.
>
> *Real* at 756 (CA9 1979). [Bracketed material added.]

A joint employment relationship does not mean that the Bureau is not therefore an employer. *Donovan v. Sandy Retirement Beach Club*, 25 WH Cases 818 (SD Tx 1982).

The joint employment concept has long been recognized in FLSA cases. This concept has its genesis in the Act's definition of employer as ". . . *any* person acting directly or indirectly in the interest of an employer in relation to an employee..." 29 U.S.C. §203(d). [Emphasis added]; *see also Walling v. Wabash Radio Corp.* 65 F. Supp. 969 (WD Mich 1946), *aff'd* 162 F.2d 391 (CA6 1947). 29 C.F.R. §791.1 and 791.2 provide:

> (b) Where the employee performs work which simultaneously benefits two or more employers ... a joint employment relationship generally will be considered to exist in situations such as:
>
> * * *
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee...
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. [footnotes omitted]

Assuming *arguendo* that the caregiver such as Mrs. Salyer is "hired" by someone other than the Bureau, her work is "in the interest of" the Bureau, she is "controlled by the Bureau", thus she is a Bureau employee.

The facts demonstrate that the Bureau "suffers" Mrs. Salyer to work.

There can be no doubt that the defendants "suffer" home caregivers such as Mrs. Salyer to work. As a matter of economic reality the Bureau has ultimate control over every important aspect of the employment. Its ultimate control over the employment relationship makes it at least a joint employer of Mrs. Salyer and all similarly situated health care providers.

The employment of such health care providers "simultaneously benefits" the Bureau and the injured worker, since the alternative of institutionalization of such injured workers who could not otherwise remain in their homes, or provision of nursing services through a company, is obviously much more expensive and would place a greater burden upon the Workers' Compensation trust fund.

Because the economic reality demonstrates that Mrs. Salyer is an employee of the Bureau, the Bureau is subject to FLSA liability.

The Bureau in the lower court [R. 2, Motion to Dismiss] pointed to various items which it does not provide Mrs. Salyer. Those items are irrelevant because they are not from Fair Labor Standards Act cases. Additionally, any items cited by the Bureau which they do not provide are irrelevant because as a matter of economic reality, employer status belongs to the Bureau. Factors not supplied by the employer

> do[] not tip the balance in favor of independent contractor status where, as here, the economic realities of the situation

> indicate that the employee depended upon the employer for his livelihood . . .
>
> *Robicheaux* at 667.

Robicheaux at 667, found an employment relationship, even though the employees

> provided their own insurance coverage, listed themselves as self-employed on their tax returns, and had their own business cards and letterheads.

In the present case, as discussed above, the "economic reality" is that Mrs. Salyer is dependent upon the Bureau. Therefore, the Bureau is the employer for FLSA purposes.

2. The Companionship Services Exemption is a narrow exception which should not apply to the present case.

Under 29 U.S.C. §213(a), the provisions of 29 U.S.C. §206 and §207 do not apply to individuals engaged in "*domestic service employment* to provide companionship services", [emphasis added.]

The "companionship services" exemption must be narrowly construed because

> The FLSA is a remedial act and exemptions from its coverage are to be narrowly construed against employers. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392.
>
> *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 282 (CA7 1993).

The Court of Appeals failed to narrowly apply this exemption.

In fact, the Court of Appeals *broadly* applied this exemption — holding that *any* person employed in a private home is engaged in "domestic service employment."

There is no basis for applying such a broad definition; nor is there any basis for applying this exemption to caregivers such as Mrs. Salyer.

That exemption does not apply to the present case because the Bureau does not employ Mrs. Salyer to provide domestic service employment. Their hiring of her encompasses medical necessity — there must be a request by the treating physician, and approval comes only after a Bureau nurse and/or a Bureau doctor review the need and approves the necessity.

Further, the exemption does not apply because under the regulations, "companionship services" are

> those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and other similar services. . .
>
> 29 CFR §552.6,

The services provided by caregivers such as Mrs. Salyer are not "companionship services" because they are not for "fellowship, care and protection." By the Bureau's rules, they will not pay for "companionship services." Rather the Bureau pays for the medically necessary services which it refers to as "caregiver services."

The Court of Appeals ignored the Bureau's rules. Curiously, the Court of Appeals indicated that these rules are "irrelevant". How can they be irrelevant when they indicate the scope of Mrs. Salyer's employment?

The Bureau has paid Mrs. Salyer for work related to Mr. Salyer's medical condition. These are necessary "nursing" services. Payment for these services is approved only after medical review by a Bureau reviewing nurse and/or doctor. Therefore, her work was not "companionship services" and the companionship services exemption does not apply.

The Bureau clearly does not employ caregivers such as Mrs. Salyer in domestic service employment. It hires these individuals on a medical need basis. There must be a demonstration of medical necessity — verified by Bureau medical personnel — before the Bureau will authorize payment.

Such medical services are not domestic service employment.

The regulations adopted by the Secretary, contained in 29 CFR §552.6 further demonstrate that this exemption does not apply to Mrs. Salyer.

Under 29 CFR §552.6,

> the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and other similar services. . .
>
> [Emphasis added.]

This present case does not involve such services. Companionship services are services such as "household work related to the care" of the individual.

However, the Bureau does not pay for such services:

> by BWC rules the following tasks DO NOT constitute nursing care: maintenance of household, preparing meals, washing clothes, running errands, child care, etc. Nursing services shall include, but not be limited to: manual feeding, bathing, toileting, dressing, transferring, transporting, administering medications and/or treatments, and/or caring for a mentally incompetent claimant.
>
> [Ltr from BWC, dated March 31, 1993, Shively depo ex. 1, p. 8]

The household work referred to in the definition of companionship services are not things which the Bureau will authorize payment for.

This case involves medical services which the Bureau has authorized Mrs. Salyer to perform. If Mrs. Salyer did not provide these services, they would have to be provided by "an aide or attendant employed by a home health agency." (Shively depo. 1st Tr. p. 83).

That these are medical services, not companionship services, is further demonstrated by the fact that Mrs. Salyer is not paid unless there is adequate documentation from Mr. Salyer's doctor that the services are needed, and this documentation must be approved by the Bureau's medical section — through both a nurse and a doctor's review.

Such "medical" services are not "companionship" services.

How then, could the companionship services exemption apply? Furthermore, assuming *arguendo* that some work covered by the "companionship services" exemption is involved, the evidence also demonstrates that Mrs. Salyer did other work not covered by the exemption. Therefore, the exemption does not apply:

> where both exempt and non-exempt work are performed during the work week the entire work is treated as non-exempt.
>
> *Marshall v. Intraworld Commodities Corp.*, 89 LC 49,269, 49,272, citing *Skipper v. Superior Daries, Inc.*, 512 F.2d 409, 411 (CA5 1975).

The facts demonstrate that Mrs. Salyer's work does not fit within the companionship services exemption.

The FLSA is a remedial act. Its exemptions are to be narrowly construed. To construe the exemption to apply to Mrs. Salyer is to narrowly construe the remedial act.

That exemption only applies to household services, while payment for the services provided by Mrs. Salyer depends on a demonstration of medical necessity.

Nor do the services she provides fit within the definition of companionship services in 29 CFR 552.6. She does not provide "fellowship, care and protection." The Bureau would not provide payment for such services.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
Electronic Citation: 1996 FED App. 0142P (6th Cir.)
File Name: 96a0142p.06

No. 95-3531

United States Court of Appeals for the Sixth Circuit

Rosa Salyer,
Plaintiff-Appellant,

v.

Ohio Bureau of Workers' Compensation and Wesley Trimble, Administrator,
Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed May 17, 1996

Before: BROWN and SILER, Circuit Judges; HOOD, District Judge.*

BAILEY BROWN, Circuit Judge. Plaintiff Rosa Salyer appeals from the district court's award of summary

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

judgment to the Ohio Bureau of Workers' Compensation ("the Bureau") and its administrator in an action for alleged violations of the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1994) ("FLSA"). Salyer serves as a "caregiver" for her disabled husband and, pursuant to the Ohio workers' compensation system, she receives $24 a day from the state for her efforts. Salyer contends that the Bureau, which administers the system, is her "employer" and she is its "employee" under FLSA. Thus, Salyer argues, the FLSA's minimum wage and overtime requirements apply to her case, and the Bureau should pay for alleged violations of those requirements. The Bureau denies employing Salyer and contends, in the alternative, that Salyer's efforts fall within the FSLA's exemption for "companionship services," 29 U.S.C. §213(a)(15). Because we agree with the Bureau's latter contention, we AFFIRM.

I. BACKGROUND

Salyer's husband suffered a serious back injury while operating heavy machinery on a construction job in 1969, and he received permanent and total disability status from the State of Ohio in 1974. Ms. Salyer, meanwhile, voluntarily quit her job to care for her husband, and has not worked outside the home since. She testified that she (1) helps her husband dress, including putting on his back brace and support hose; (2) gives him his medication; (3) helps him bathe and shower; (4) assists him in getting around their home; and (5) cleans his bedclothes when he loses control of his bowels. Ms. Salyer testified that she spends nine to ten hours per day completing all of her tasks for her husband's care, but she described her efforts as "a 24-hour-a-day job." She also testified that she received no training in the performance of her tasks.

Salyer receives payment for her efforts pursuant to Ohio's workers' compensation law. The Ohio Legislature has created

an insurance fund to compensate workers who receive injuries on the job. Ohio Rev. Code Ann. § 4123.31 (Baldwin 1995). The Bureau is a state agency that was created to administer this compensation program. *Id.* § 4121.121 (Baldwin Supp. 1996). The Bureau's administrator has the power, *inter alia*, to review and process claims applications, and to award compensation and make payment on proper claims. *Id.* § 4121.39 (Baldwin 1995). Moreover, the administrator is authorized (1) to pay amounts from the fund for any medical, nursing, and hospital services which he deems appropriate, and (2) to adopt rules regarding such services. *Id.* § 4123.66(A) (Baldwin 1995).

The specific rules governing the state's payment for nursing services are set forth at section 4123-7-25 of the Ohio Administrative Code. These rules provide for situations like the instant case, in which medical services by a registered nurse or a licensed practical nurse are not needed. In such cases, the injured worker's physician must request nonlicensed "caregiver" services, which may be rendered either by a home health agency nurse's aide or attendant, or by a caregiver spouse like the plaintiff. Ohio Admin. Code § 4123-7-25(F) (1994). The treating physician must also develop a treatment plan which indicates what services should be provided. *Id.* The Bureau then determines whether the requested services are both medically necessary and related to the condition for which the injured worker's claim was allowed, and it does so by having a nurse and a doctor review the claimant's file.

Caregiver services which the Ohio regulations deem appropriate include assistance with bathing or eating, placing on a bedpan, assistance with dressing or moving, other assistance with personal hygiene, and the care and supervision of a mentally incompetent claimant. *Id.* The regulations specifically forbid payment, however, for household, personal, or other duties, such as maintaining the house, washing clothes, preparing meals, or running errands. *Id.*

The Bureau's Medical Management Cost Containment Division determines what fees to pay all people who provide needed services to claimants including nonlicensed spousal caregivers like Ms. Salyer. *Id.* §4123-7-25(F)(5). The payment rate is not negotiated, and it is a flat per diem amount. According to the testimony of Yvette Shively, a Senior Policy Analyst with the Bureau, caregivers bill the Bureau every two weeks for their services, and the Bureau pays for any special medical equipment needed for the injured worker, as long as it is related to the worker's allowed condition. For example, in the instant case, the state has purchased a hospital bed and a portable toilet for Mr. Salyer's use.

Testimony below revealed that the Bureau typically authorizes home caregiver services such as the services Salyer provides her husband for one year at a time. At the end of the year, the claimant's treating physician must again request the services. If the physician requests no changes in service, then the Bureau generally authorizes the request for another year. If a change is requested, however, the Bureau may, in its discretion, order an in-home evaluation by a registered nurse. In any event, the Bureau may annually conduct an in-home evaluation of the home spousal caregivers.

The Bureau keeps records of caregivers like Ms. Slayer only in the claim files of injured workers. Further, the Bureau does not deduct state or federal income or unemployment taxes from the paychecks of caregivers like Ms. Slayer, and the Bureau asks that such caregivers sign a form indicating that they understand this situation.

While the Bureau maintains that it cannot hire or fire caregivers, it can decide—even contrary to a treating physician's recommendation—that a caregiver's services are no longer (1) medically necessary, or (2) related to the condition for which the injured worker has a legitimate claim. Thus, the Bureau can stop paying a caregiver, though it cannot make the caregiver stop performing services.

II. ANALYSIS

We review a grant of summary judgment *de novo*, applying the same test the district court used. *E.g., City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Congress designed the FLSA "to be 'a broadly remedial and humanitarian statute.'" *Fegley v. Higgins*, 19 F.3d 1125, 1132 (6th Cir.) (quoting *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143 (6th Cir. 1977)), *cert. denied*, 115 S. Ct. 203 (1949). To that end, this court construes the FLSA's definitions broadly, so as to give effect to Congress' intentions and policies. *Id.* Exemptions from the FLSA's minimum wage and overtime coverage,[1] on the other hand, are to be narrowly construed against employers. *E.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). An "employee" is "any individual employed by an employer." *Id.* § 203(e)(1). An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." Id. §203(d). Finally, the FSLA specifically applies to employees "employed in domestic service in a household." *Id.* § 206(f). This court has previously noted the extraordinary breadth of the FLSA's definitions. *E.g., Fegley*, 19F.3d at 1132 n.5.

Despite the wide swath these definitions cut, the FLSA does not apply to everyone who has a job. Congress expressly excludes from FLSA coverage "any employee employed in domestic service employment to provide **companionship services** for individuals who (because of age or infirmity) are unable to

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[1] See 29 U.S.C. § 206 (mandating payment of minimum wage); *id.* §207(a) (mandating payment of overtime.)

care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15) (emphasis added).

The parties devoted the majority of their appellate briefs and oral arguments to the close question of whether the Bureau "employs" Ms. Salyer. *See, e.g., Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1467-70 (9th Cir. 1983) (holding that public social service agencies were "employers" of in-home chore workers who served disabled public assistance recipients). The district court, after a careful consideration of the facts and background set forth above, held that the Bureau did not employ Ms. Salyer. We need not review that holding, however, because (as the district court noted) even if the Bureau does "employ" Ms. Salyer for purposes of the FLSA, Ms. Salyer's claim still fails if what she provides her husband are "companionship services."

In addition to the statutory definition noted above, the Secretary of Labor has further defined "companionship services" as follows:

> [T]he term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, That such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term "companionship

> services" does not include services relating to the care of protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.
>
> 20 C.F.R. § 552.6 (1995).

Assuming, without deciding, that the Bureau does "employ" Ms. Salyer, we agree with the district court's holding that Ms. Slayer performs "companionship services" under both the statutory and regulatory definitions of that term. Thus, her services are excluded from the minimum wage and overtime requirements of the FLSA as a matter of law.[2]

Ms. Salyer's own testimony was that she helps her husband dress, gives him his medication, helps him bathe, assists him in getting around their home, and cleans his bedclothes when he loses control of his bowels. These sorts of services fall squarely within the plain language of the statutory definition of "companionship services," *i.e.*, services "for individuals who (because of age or infirmity) are unable to care for themselves."

Moreover, Ms. Salyer's services also meet the regulatory definition of "companionship services," because they "provide fellowship, care, and protection" for Ms. Salyer, who, "because of ... physical ... infirmity, cannot care for his own needs." Because those services "may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services," we find the regulation to be directly on point. Furthermore, we cannot say that this regulatory definition of "companionship

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[2]Moreover, Ms. Salyer does not meet either of the exceptions (the "trained services" exception or the "general household" exception) which the above regulation outlines. She testifies that she has received no training, and the record indicates that the vast majority of the housework she does is related to caring for her husband.

services" is either "arbitrary, capricious, or manifestly contrary to the statute" that is elucidates. Thus, we must give it "controlling weight." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 873, 844 (1984).

The handful of cases that have considered the "companionship services" exemption bolster this conclusion. In a recent case, *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304 (7th Cir. 1995), the court considered whether a home health aide, who was employed by a private agency, provided companionship services. Such aides performed more extensive services than those which Ms. Salyer provides for her husband. *Id.* at 1306. Furthermore, under the applicable state law in *Cox*, the aide's services required more training than do the services listed in the federal regulation. *Id.* Nonetheless, the aide's medical training was far less than that required of registered or practical nurses. *Id.* at 1309-10. The court thus held that the home health aide fell under the exemption. *Id.* at 1311. See also *Linn v. Developmental Servs.*, 891 F. Supp. 574, 576-78 (N.D. Okla. 1995) (holding that a plaintiff who provided similar services, which also required limited training and state certification, "was employed to provide fellowship and protection for individuals of advanced age and physical and mental infirmities"); *Sandt v. Holden*, 698 F. Supp. 645, 67-68 (M.D. Pa. 1988) (holding that plaintiff, who provided similar services which were arguably "attendant care services" under state law, fell within the exemption).

The Cox court relied, in part, on *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 110 (9th Cir. 1990), aff'd 643 F. Supp. 1444 (D. Or. 1986), a case quite similar to the instant case. The plaintiffs in McCuen were "full-time, live-in attendants for elderly and infirm individuals unable to care for themselves." *Id.* at 1108. The State of Oregon provided the plaintiff's services to "allow[] the recipients to stay at home and avoid institutionalization" and to save the state the high

cost of such institutionalization. 643 F.Supp. at 1446. In holding that the companionship services exemption applied to the plaintiffs, the Ninth Circuit noted that:

> these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

894 F.2d at 1110. The instant case is analogous to *McCune* in that (1) Ms. Salyer lives with the object of her care, and she testified that she provides that care virtually around the clock; and (2) Ohio's provision of spousal caregiver services, like Oregon's system, enables recipients like Mr. Salyer (and the cost-paying state) to avoid institutionalization. Thus, the same rationale exists here for applying the exemption. See also *Lott v. Rigby*, 746 F. Supp. 1084, 1087 (N.G. Ga. 1990) (noting, after reviewing a Labor Department administrative opinion, that "Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.")

Finally, we look to this court's own precedent in *Toth v. Green River Regional Mental Health/Mental Retardation Board, Inc.*, 753 F. Supp. 216 (W.D. Ky. 1989), *aff'd sub nom. Hengesback v. Green River Regional Mental Health/Mental Retardation Board, Inc.*, 985 F.2d 560 (6th Cir. 1993) (table). The plaintiffs in Toth were "Alternative Living Unit ... providers," working in "a program designed to keep mentally retarded

adults out of institutions and to integrate them into local communities." 753 F.Supp. at 216. In that program, which the defendant entity administered, the plaintiffs cooked and maintained homes for their clients. Id. The district court held that the plaintiffs, who had only minimal training and whose work largely "related to the care of the client[s]," (1) fell within the companionship services exemption, and (2) could not establish facts sufficient to meet either the "general household" or "trained personnel" exceptions. *Id.* at 217-18.

Ms. Salyer's argument against the application of the companionship services exemption to her is that the Bureau does not employ caregivers like herself in "domestic service employment," as the statutory exemption requires. Rather, she contends, the Bureau "hires" spousal caregivers to address medical needs, not for "domestic services." She also notes that the Bureau's own regulations indicate that it does not pay for "household work related to the individual," which the federal regulation expressly contemplates as a component of companionship services. *See* Ohio Admin. Code § 4123-5-25(F) (denying compensation for household duties.)

We reject these arguments for two reasons. First, we find persuasive the rationale of the court in *Lott*, 746 F.Supp. at 1087-88, which drew on the exemption's legislative history to hold that "domestic service employment service" simply means being "employed in a private home." Because Ms. Salyer renders her services to Mr. Salyer almost entirely within their home, she is undoubtedly engaged in domestic service employment to provide companionship services to her disabled husband. *Cf. Linn*, 891 F.Supp. at 578-79 (holding that a plaintiff analogous to Ms. Salyer who did not work in private homes did not fall within the companionship services exemption). Moreover, as heretofore indicated, the companionship services exemption exists to increase the availability of such services which, in turn, address medical needs. Ms. Salyer's argument thus works

against her position that the companionship services exemption from the FLSA does not apply to her.

Second, the state regulation is irrelevant because (1) the federal regulation is directly on point, and (2) the things which the Bureau will pay for under its regulation are largely, we believe, also companionship services under the federal regulation *Compare* 29 C.F.R. §552.6 (1995) listing, as companionship services, meal preparation, bed making, washing of clothes, and similar services, along with household work related to the care of the individual) *with* Ohio Admin. Code § 4123-7-25(F) (1994) (allowing compensation for assistance with bathing or eating, placing on a bedpan, assistance with dressing or moving, and assistance with personal hygiene, but refusing compensation for general household work). Ohio indeed may not pay for every service that is contemplated by the federal regulation that exempts companionship services from the FLSA; nevertheless, the services for which Ohio will pay remain subject to federal regulation exemption in the context of minimum wage and overtime laws. *See Sandt*, 698 F.Supp. at 68 (rejecting an analogous plaintiff's reliance on provisions of Pennsylvania's Attendant Care Services Act where the FLSA and its companionship services exemption applied to the case).

III. CONCLUSION

Because the services which Ms. Salyer provides for her husband fall squarely within the "companionship services" exemption from the FLSA, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Rosa Salyer, et al.,
Plaintiffs,

vs.

Case No. C2-94-814
JUDGE GRAHAM

Ohio Bureau of Workers' Compensation, et al.,
Defendants.

OPINION AND ORDER

This is an action filed by Rosa Salyer on her own behalf and on behalf of others similarly situated against the Ohio Bureau of Workers' Compensation ("BWC") and Wes Trimble, Administrator of the BWC. Plaintiff is a nonskilled spousal caregiver who receives compensation from the BWC for providing care giving services to her husband, Auburn Salyer, who is permanently disabled as the result of a work-related injury. Plaintiff alleges that the BWC is her employer for purposes of the Fair Labor Standards Act of 1938 ("FLSA"), and that defendants have violated the minimum wage and overtime requirements of 6(a) and 7(a) of the Act, 29 U.S.C. 206(a) and 207(a).

On November l, 1994, defendants moved to dismiss the complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), asserting that this court did not have jurisdiction under

the FLSA because no employer-employee relationship exists between the BWC and the plaintiff. On December 2, 1994, the court converted the motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56 and permitted the parties to conduct discovery concerning plaintiff's own claims. Defendants' motion for summary judgment is now before the court for decision.

Defendants contend that this court lacks jurisdiction over plaintiff's claims because plaintiff has not filed a written consent to become a party. Under 29 U.S.C. 216(b), no employee shall be a party plaintiff to an FLSA action "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." In *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), the Sixth Circuit construed this language as being applicable solely to representative actions and concluded that there was no need for a named plaintiff seeking relief on his own behalf to file a written consent. Insofar as plaintiff seeks to assert claims on her own behalf under the FLSA, written consent is not required to confer jurisdiction. However, insofar as plaintiff seeks to represent others similarly situated, the filing of the written consents of such persons is required before they may be parties to this action. Since no written consent executed by another party has been filed to date, the only claims in this action are those of plaintiff herself.

Plaintiff alleges that defendants have failed to comply with the minimum wage and overtime requirements of the FLSA. However, defendants may be required to comply with the FLSA only if the BWC is an "employer" and plaintiff is an "employee" of the BWC, as those terms are defined in the FLSA. Under the FLSA, an "employee" is any individual employed by an employer. 29 U.S.C. 203(e)(1). An employer is one who acts "directly or indirectly in the interest of an employer in relation

to an employee. 29 U.S.C. 203(d). To "employ" means to "suffer or permit to work." 29 U.S.C. 203(g).

The question of whether a party is an employer within the meaning of the FLSA is a legal determination. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991). In deciding whether a party is an employer, considerations of economic reality and economic dependency control rather than common law concepts of agency. *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28 (1961); *Dole*, 942 F.2d at 965. The "economic reality" test includes inquiries into whether the alleged employer 1) had the power to hire and fire the alleged employees, 2) supervised and controlled employee work schedules or conditions of employment, 3) determined the rate and method of payment, and 4) maintained employment records. *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

No material dispute of fact has been shown to exist regarding the underlying circumstances of this case. Plaintiff's husband is totally and permanently disabled as the result of a back injury sustained at work. Since he has been adjudged unable to work, he is eligible for various benefits payable through the BWC, including benefits for spousal caregiver services. To fully understand the nature of these benefits, it is necessary to review the legal basis for the workers' compensation system in Ohio.

Under Article II, §35 of the Ohio Constitution, the legislature is authorized to pass laws for "the purpose of providing compensation to workmen and other dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment. Section 35 further authorizes the legislature to establish "a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom." Section 35 also provides for laws establishing a board "to collect, administer and distribute

such fund, and to determine all right of claimants thereto. The compensation authorized by 35 is in lieu of any other rights to compensation or damages which the injured worker would otherwise have against his employer.

In accordance with 35, Article II, the legislature has created a workers' compensation state insurance fund. Ohio Revised Code 4123.31. The BWC is a state agency which was created to administer the workers' compensation program. See Ohio Revised Code 4121.12. The BWC is headed by an administrator who is authorized to direct the operations of the BWC, and, with the approval of the workers' compensation board, to adopt rules with respect to the collection, maintenance and disbursements of the state insurance fund. Ohio Revised Code 4121.12.1, 4123.32. The administrator has the power and duty to review and process claims applications and to award compensation and make payment on non contested and proper claims. Ohio Revised Code 4121.39. The administrator is required to maintain a medical section within the BWC to assist with establishing standard medical fees, approving medical procedures, determining eligibility for and the reasonableness of compensation payments for medical services, and establishing guidelines for payment policies. Ohio Revised Code 54121.12.1(P). The administrator is authorized to pay amounts from the state insurance fund for medical, nursing and hospital services which he deems appropriate, and to adopt rules with respect to such services. Ohio Revised Code 4123.66(A).

Payment for nursing services is governed by Ohio Admin. Code 4123-7-25. The regulation provides for nonlicensed caregiver services rendered by a home health agency nurse's aide or attendant, or by a caregiver spouse in cases where the injured worker requires assistance due to a disability stemming from the work-related injury and where medical services by a licensed registered or practical nurse are not required. Ohio

Admin. Code § 4123-7-25(F). Requests for approval of caregiver services must be made by the worker-claimant's physician, accompanied by a detailed statement of the nature of the services required, the reason for the services and the medical necessity for such services. Ohio Admin. Code 4123-7-25(F)(l). Caregiver services which may be approved include assistance with bathing or eating, placing on a bed pan, assistance with dressing or moving, other assistance with personal hygiene, and the supervision and care of a mentally incompetent claimant. Ohio Admin. Code 4123-7-25(F). Household, personal or other duties such as maintaining a household, washing clothes, preparing meals or running errands are not reimbursable caregiver services. *Id.* The fees payable for the services of a nonlicensed spousal caregiver are determined by BWC's medical Management Cost Containment Division. Ohio Admin. Code 4123-7-25(F)(5).

The first factor of the "economic reality" test is whether the alleged employer has the power to hire and fire the alleged employee. According to the deposition testimony of Yvette Shively, Senior Policy Analyst with BWC's Medical Management Cost Containment Division, BWC has no control over the hiring or firing of the provider of caregiver services. (Shively Dep., p. 78). BWC does not retain a nurse or caregiver on behalf of the injured worker. Thus, this case differs from *Bonnette v. California Health & Welfare Agency*, 414 F. Supp. 212 (N.D. Cal. 1976), 525 F. Supp. 128 (N.D. Cal. 1981), aff'd, 704 F.2d 1465 (9th Cir. 1983), where chore service workers were hired directly by the state agency. Rather, the claimant must request authorization for the expenditure of funds for the purpose of obtaining caregiver services by means of an application filed by the claimant's attending physician. (Shively Dep., p. 18). The request for services is reviewed by BWC's Utilization Management Department to determine if the services requested are medically necessary and if the services

are related to an injury of the claimant which has been allowed or recognized by the BWC. (Shively Dep., p. 19). Payment is authorized only in respect to services which are medically necessary and related to the conditions which were allowed in the worker's BWC claim for benefits. (Shively Dep., p. 27). When payment for caregiver services is approved, the claimant may hire an aide or attendant employed by a health care agency or may arrange for his spouse to perform these duties. (Shively Aff., p. 5). The claimant, in this case Mr. Salyer, retains the sole right to terminate the services of the caregiver, and BWC takes no part in the termination or replacement of the caregiver. (Shively Dep., pp. 78-83). The role of the BWC is to determine if the payment of funds from the state insurance fund is appropriate under the criteria of medical necessity and relation to an allowed injury, and whether the person proposed by the claimant and his physician to act as caregiver meets the BWC's qualifications for the position of caregiver. The claimant's physician may recommend services which do not meet BWC's requirements, and the claimant is free to obtain such services, but BWC would not be responsible for payment of benefits for such services. (Shively Dep., p. 27).

In regard to the second factor of the economic reality test, the evidence shows that the BWC does not control or supervise the caregiver's work schedule or the conditions of employment. The BWC does not keep track of the hours plaintiff works. Rather, plaintiff is paid a flat per diem rate. (Shively Dep., p. 49). While the BWC may review services provided by a caregiver, this review is for the purpose of assuring that the bills presented were for services actually rendered and for services which were in fact medically necessary, and that the provider has not misrepresented the amount or cost of the services provided. *See* Ohio Revised Code § 4121.12.(P)(3); Ohio Admin. Code §§ 4123-7-38, 4123-7-40. The BWC does not evaluate plaintiff's performance. (Shively Dep., p. 80). The

BWC is authorized to make an annual visit to the home, and a home evaluation would also occur if there is a request for a change in services. (Shively Dep., p. 38). However, these visits are for the purpose of verifying the claimant's physical condition, and to determine whether caregiver services are still medically necessary and whether the services are related to the allowed injury, not to review plaintiff's performance as a caregiver. (Shively Dep., pp. 39-40). *See also*, Ohio Admin. Code § 4123-7-25(I), (J). BWC also authorizes the purchase of special medical equipment which is needed for the care of the claimant at the request of the claimant's physician, and disburses funds to the providers of that equipment. (Shively Dep., pp. 71-72). BWC provides no office facilities or equipment to plaintiff. (Shively Aff., p. 10).

The third factor addresses whether the alleged employer determines the rate and method of payment. The funds which plaintiff receives from BWC are based upon a per diem rate established by the BWC, and plaintiff is required to present a bill for her services to BWC on a biweekly basis. (Shively Dep., pp. 49-50). The per diem rate is set by a claims examiner employed by BWC, and represents the amount of benefits which BWC is willing to provide to the injured worker for these services. The regulations state that no legal relationship by contract or otherwise arises from the direct payment of funds to a health care provider. Ohio Admin. Code 4123-7-30(A). The services provided are the legal obligation of the worker-claimant, and direct payment to the health care provider is a discretionary method by which an award of benefits to the worker may be discharged. Ohio Admin. Code 4123-7-30(B). If the worker or physician arranged for services unrelated to the allowed injury, BWC would not be responsible for payment for those services. (Shively Dep., p. 27).

The fourth factor addresses whether the alleged employer maintains employment records. BWC maintains no employment

records for plaintiff. Any documentation concerning funds disbursed to her as a caregiver are placed-in her husband's file. (Shively Dep., p. 53). Plaintiff is not a civil service employee. (Shively Aff. p. 9). Plaintiff receives no benefits or vacation, sick leave, or personal leave. *Id.* The BWC does not deduct taxes or retirement payments from the amounts paid to plaintiff, and does not pay workers' compensation taxes for plaintiff. (Plaintiff's Dep., pp. 54-55). On April 15, 1993, plaintiff signed a document which notified her that she was responsible for reporting the payments she received to the Internal Revenue Service and paying taxes on those payments. (Exhibit A-3, Defendant's Motion to Dismiss).

The economic reality factors indicate that the BWC is not plaintiff's employer. The functions of the BWC consist of 1) the prompt and accurate payment of compensation and benefits for employment-related injuries in accordance with applicable statutes and regulations, 2) identifying and auditing employers to ensure an optimum level of premium payment, 3) establishing workers' compensation coverage under the state insurance fund and collecting premiums from employers, 4) auditing and monitoring self-insured programs and 5) investing surplus funds in accordance with law. Ohio Admin. Code 4123-9-01. The BWC is in essence a government-managed insurance company. The BWC is not in the business of providing health care services. Rather, it is the function of the BWC to provide monetary benefits to injured workers so that they can obtain health care services. Like any private insurance company, the BWC monitors the payment of claims to the extent necessary to ensure that the claimant is entitled to the benefits disbursed by BWC. However, there is no evidence before the court that the BWC actually solicits or engages the services of caregivers on behalf of the claimant or exercises any control over the manner in which the caregiver performs the services beyond verifying that the services billed were actually performed.

Plaintiff does not perform any services which accrue to the benefit of BWC. The BWC does not "suffer or permit" plaintiff to work. 29 U.S.C. 203(g). Rather, BWC merely makes funds available to plaintiff's husband, thereby enabling plaintiff's husband to compensate plaintiff for her caregiving services. Mr. Salyer would be free to hire an aide or attendant employed by a home health agency to provide the services now furnished by plaintiff, and that attendant would be reimbursed through benefits payable at the established rate. (Shively Dep., p. 82). Plaintiff would be free to seek employment outside the home. Her economic difficulties or dependencies are not the result of any relationship between plaintiff and BWC, but rather stem from her husband's disabilities and her desire to quit her job and stay at home to care for her husband and to ensure that he did not have to go to a nursing home. By assuming the caregiving duties herself, the benefits payable for care giving services remain in the household rather than being paid to an outside agency. The benefits are due to plaintiff's husband, but are paid directly to plaintiff for purposes of convenience. They are not paid by BWC as an employer of plaintiff, just as benefits paid under the terms of a policy with a private insurance company would not alone result in a physician or other health care provider paid with those benefits being an employee of the insurance company. The BWC payments to plaintiff and her husband are in the nature of insurance benefits. *Cf. Savage v. Correlated Health Serv.. Ltd.*, 64 Ohio St.3d 42, 591 N.E.2d 1216 (1992) (workers compensation benefits constitute "insurance" under Ohio Revised Code 52305.27 and do not reduce medical malpractice damage awards).

The BWC is not plaintiff's employer as that term is construed under the FLSA, and no genuine issue of material fact has been shown to exist in that regard.

Defendants further argue that even if the BWC is assumed to be plaintiff's employer for purposes of the FLSA, plaintiff

falls under the exclusion for "companionship services." Under 29 U.S.C. 213(a)(15), "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" is exempt from the FLSA minimum wage and overtime pay requirements. The term "companionship services" is defined in 29 C.F.R. §552.6 as "those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." Companionship services "may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and other similar services." 29 C.F.R. 552.6. The term "companionship services" does not include general housework which exceeds over twenty percent of the total hours worked or services which require and are performed by trained personnel such as a registered or practical nurse. *Id.*

The services which plaintiff performs for her husband, including helping him to bathe, dress, and put on his back brace and support stockings, helping him to use the bathroom and to get into his wheelchair, and cleaning the bedclothes when he loses control over his bowels, fall within the definition of "companionship services."

There is no evidence that either of the exceptions to the definition of "companionship services" applies in this case. Plaintiff received no training from the BWC on how to perform her duties, and she completed the eleventh grade in high school and had no subsequent formal education. (Plaintiff's Dep., pp. 11-12, 41). There is no evidence that the services performed by plaintiff for her husband require a trained person. Plaintiff does not fall within the "trained personnel" exception to the definition of "companionship services." See *Toth v. Green River Regional Mental Health/Mental Retardation Bd., Inc.*, 753 F. Supp. 216 (W.D. Ky. 1989); *Sandt v. Holden*, 698 F. Supp. 64 (M.D. Pa.

1988); *McCune v. Oregon Senior Servs. Div.*, 643 F. Supp. 1444 (D. Ore. 1986), aff'd, 894 F.2d 1107 (9th Cir. 1990). The exception regarding the performance of general housekeeping tasks is likewise inapplicable. There is no evidence as to the amount of time plaintiff spends doing general housekeeping. *See Toth*, 753 F. Supp. at 217. In any event, such evidence would not be relevant. Unlike the situation in *Bonette*, where part of the workers' contractual duties included domestic chores, in this case general housework and other services which do not constitute nursing care do not qualify for reimbursement by BWC. (Shively Dep., pp. 55-56). Therefore, plaintiff receives no compensation from the BWC for duties which can be classified as general housekeeping tasks, and such tasks are not performed as a part of any agreement or relationship between plaintiff and BWC. Therefore, even assuming that the BWC could be considered plaintiff's employer, the tasks for which plaintiff receives compensation would fall within the "companionship services" exclusion under 213(a)(15), and no genuine issue of material fact has been demonstrated in that regard.

In accordance with the foregoing, defendants' motion for summary judgment is granted. The clerk shall enter judgment for the defendants.

It is so ORDERED.

/s/

JAMES L. GRAHAM

United States District Judge

DATE: April 14, 1995

STATUTES AND CODE PROVISIONS CITED

29 U.S.C. §203(e)(1):

Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer

29 U.S.C. §203(g):

"Employ" includes to suffer or permit to work

29 U.S.C. §213(A)(15):

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to --

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) areunable to care for themselves (as such terms are defined and delimited by regulations of the secretary)

29 C.F.R. §552.6:

As used in section 13(a)(15) of the Act, the term 'companionship services' shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such

services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

OHIO REVISED CODE 4123.66(A):

In addition to the compensation provided for in this chapter, the administrator of workers' compensation shall disburse and pay from the state insurance fund the amounts for medical, nurse, and hospital services and medicine as he deems proper and, in case death ensues from the injury or occupational disease, he shall disburse and pay from the fund reasonable funeral expenses in an amount not to exceed thirty-two hundred dollars. The bureau of workers' compensation shall reimburse anyone, whether dependent, volunteer, or otherwise, who pays the funeral expenses of any employee whose death ensues from any injury or occupational disease as provided in this section. The administrator may adopt rules, with the advice and consent of the workers' compensation oversight commission, with respect to furnishing medical, nurse, and hospital service and medicine to injured or disabled employees entitled thereto,

and for the payment therefor. In case an injury or industrial accident that injures an employee also causes damage to the employee's eyeglasses, artificial teeth or other denture, or hearing aid, or in the event an injury or occupational disease makes it necessary or advisable to replace, repair, or adjust the same, the bureau shall disburse and pay a reasonable amount to repair or replace the same.

Ohio Administrative Code 4123-7-25(F)(5)

Reasonable fees for a non-licensed claimant's spouse shall be determined by the bureau's medical section taking into consideration the functions of care performed according to the caregiver services level in the bureau standard of care. This provision shall apply only for services approved prior to the effective date of the amendment to this rule.

Supreme Court, U.S.
FILED
OCT 1 1996
CLERK

CASE NO. 96-207

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ROSA SALYER AND OTHERS SIMILARLY SITUATED,
Petitioners,

v.

OHIO BUREAU OF WORKERS' COMPENSATION
AND WES TRIMBLE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Fair Labor Standards Act the Bureau of Workers' Compensation ["Bureau"] is an "employer" of Mrs. Salyer, and caregivers such as Mrs. Salyer.

2. Whether under the Fair Labor Standards Act Mrs. Salyer and caregivers such as Mrs. Salyer, are "employees" (*i.e.* an individual who is "employed," 29 U.S.C. § 203(e)), of the Bureau of Workers' Compensation.

3. Whether the duties performed by Mrs. Salyer, fall within the definition of "companionship services" exemption to the Fair Labor Standards Act, 29 U.S.C. § 213(a) (15).

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STATEMENT OF THE CASE

Petitioner Rosa Salyer ("Salyer") has asked the Court to review whether a spousal caregiver to an injured worker is an employee of the Respondent, Ohio Bureau of Workers' Compensation ("BWC") under the Fair Labor Standards Act ("FLSA") and therefore entitled to overtime pay and a minimum wage. Generally, Respondents agree with Petitioner's Statement of the Case. However, several points require elaboration.

BWC acts as a state funded insurance company. Pursuant to Article II, § 35, of the Ohio Constitution, a workers' compensation state insurance fund was created to provide compensation for workers who received injuries as a result of an employment related accident. Ohio Revised Code ("O.R.C.") § 4123.31. BWC was created to administer the fund. O.R.C. § 4121.12. BWC has the power *inter alia* to review and process claim applications, to award compensation and to make payment on uncontested and proper claims. O.R.C. § 4121.39. Its administrator establishes standard medical fees, determines eligibility, and pays for medical, nursing and hospital services from the state insurance fund. O.R.C.§ 4123.66(A).

Rules for the payment of nursing services are set forth in Ohio Administrative Code ("O.A.C.") § 4123-7-25. The injured worker's physician must request caregiver services. This physician must develop a treatment plan and indicate what services should be provided and at what level of care. BWC determines whether these services are medically necessary and related to the worker's allowed claim. The benefit is *per diem* and non-negotiable. There are no taxes or retirement deductions or contributions taken from the benefit.

An injured worker may receive unlicensed, unskilled caregiver services from either an independent attendant or a caregiver spouse or family member. O.A.C. § 4123-7-25. Caregiver services include assistance with bathing or eating, placing a bed pan, dressing or moving, or assistance with personal hygiene. Duties such as maintaining a household, washing clothes, preparing meals or running errands are not reimbursable caregiver services. O.A.C. § 4123-7-25(F).

Mrs. Salyer provides nonskilled caregiver services to her husband, Auburn Salyer, at his request. These services include assisting her husband to dress; giving him his medication; helping him shower; and assisting him with mobility. Mrs. Salyer does not utilize any of BWC's facilities to care for her husband. Mrs. Salyer does not work under a job description provided by BWC; nor is she evaluated by BWC. Mr. Salyer, not BWC, exercises control over the hiring and firing of the caregiver.

REASONS FOR DENYING THE WRIT

I. FEDERAL COURTS LACK JURISDICTION TO HEAR THIS CASE.

Mrs. Salyer's Petition should be denied because she lacks jurisdiction to bring her FLSA claim in light of this Court's recent ruling in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Legislation passed pursuant to the Commerce Clause which creates a private cause of action against a state in federal court (like the FLSA) is an improper abrogation of a state's sovereign immunity and is barred by the Eleventh Amendment, unless the state has consented to be sued. *Id.*

Ohio has not waived its sovereign immunity. This may only be done by the state constitution or legislature. *See, Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299, 305-07 (1990). In fact, Ohio has set forth an equivalent state "FLSA" in O.R.C. § 4111 in order to determine wage and overtime disputes in its own courts.

Since *Seminole*, numerous district courts have dismissed FLSA claims against states for lack of jurisdiction. *See, e.g, Close v. New York*, No. 94-CV-0906 (N.D. N.Y. Aug. 19, 1996); *Blow v. Kansas*, 929 F. Supp 1400 (D. Kan. June 24, 1996); *Adams v. Kansas*, No. 94-4201-RDR (D. Kan. June 24, 1996); *Moad v. Arkansas State Police Dept.*, No. LR-C-94-450 (E.D. Ark. May 14, 1996); *Stuhr v. Oregon*, No. 95-6118-TC (D. Ore. 1996); *Mills v. Maine*, No. 92-410-P-H (D. Me. July 3, 1996); *Goebel v. Colorado*, No. 3-K-1227 (D. Col. June 25, 1996); *Ross v. Middle Tennessee State Univ.*, No. 3-95-1202 (M.D. Tenn. July 17, 1996.) This court should do likewise here.

II. THERE IS NO LOWER-COURT SPLIT OF AUTHORITY ON THE ISSUES PRESENTED.

In her petition, Mrs. Salyer fails to raise a single issue that has divided the lower federal courts. Contrary to her contention, *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) is distinguishable. In *Bonnette*, the state selected and hired the in-home caregiver, not the injured worker. Here, Mr. Salyer selected his spouse as the caregiver. Moreover, the Sixth Circuit Court of Appeals never ruled on the question of whether Mrs. Salyer was employed by BWC because it found that even if she was so employed, the companionship services exemption to the FLSA applied, which disposed of the case. Under these circumstances, this case does not warrant the exercise of the Court's discretionary jurisdiction. *See* Sup Ct. R. 10.

III. THERE ARE NO SUBSTANTIAL QUESTIONS OF FEDERAL IMPORTANCE DUE TO THE CASE'S UNIQUE FACTS AND LIMITED APPLICABILITY TO OTHER POTENTIAL PLAINTIFFS.

Spousal caregiving funded by a workers' compensation fund is a limited practice in Ohio (which may be phased out in the near future) and other states. It is a unique program which enables spouses to care for an injured worker should the couple choose. It is not a general practice throughout the United States. Currently in Ohio, an injured worker, if eligible, has a choice of receiving care from a spouse, immediate family member or an independent caregiving agency. Few workers choose to have their spouse act in the caregiving capacity and even fewer spouses agree to perform this service when the care can be provided by an independent agency and the spouse can seek gainful employment. Due to the limited number of parties affected by the decision below,

it is not a substantial question of federal importance. Accordingly, the Court's discretionary jurisdiction should not be exercised.

IV. THE LOWER COURTS CORRECTLY HELD THAT THE FLSA DOES NOT APPLY TO SPOUSAL CAREGIVER SERVICES.

In addition to the above considerations for denying the writ, the lower courts correctly decided the merits of the case.

A. UNDER THE ECONOMIC REALITIES TEST, MRS. SALYER IS NOT BWC'S EMPLOYEE.

The determination of whether an individual is to be considered an employee is a factual one which is made from a consideration of the "total employment situation and the economic realities of the work relationship." *Goldberg v. Whitaker House Corp.*, 366 U.S. 28, 33 (1961); *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983). In determining whether an employer-employee relationship exists in the context of FLSA, several factors are reviewed including whether the employer:

> (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. (citations omitted.)

Bonnette, 525 F. Supp. 125, 135 (N.D. Cal. 1981.)

Other non-exclusive factors have been considered, including:

* * *

> factors, derived from *United States v. Silk*, 331 U.S. 704, 91 L. Ed. 157, 67 S.Ct. 1463 (1947) (Social Security Act), and known as the "economic reality test," includ[ing]: (1) the degree of control exercised by the employers over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. (citations omitted.)

Brock v. Superior Care, Inc., 840 F. 2d 1054, 1058 (2nd Cir. 1988). A review of the factors in *Bonnette* and *Brock* reveal that BWC does not 'suffer or permit' Mrs. Salyer to work.

BWC does not have the power to hire or fire Mrs. Salyer as Mr. Salyer's caregiver. As explained above, Mr. Salyer's physician submits applications for payment of caregiver services to BWC. The physician, not BWC, develops a treatment plan and indicates what types of services should be provided to Mr. Salyer and at what level of care.

When payment for caregiver services is approved, Mr. Salyer may hire an independent health care attendant or may arrange for his spouse or other family member to perform these duties. Mr. Salyer retains the right to hire or to terminate the services of the caregiver he chooses. As the

district court correctly noted, this is in stark contrast to *Bonnette v. California Health and Welfare Agency*, *infra*, where workers were hired directly by the state agency.

BWC does not track Mrs. Salyer's work hours. Instead, Mrs. Salyer is paid a flat *per diem* benefit. O.R.C. § 4121.12.1(P) (3), O.A.C. §§ 4123-7-38 and 4123-7-40 provide that BWC may review the services provided by Mrs. Salyer only to insure that the bills presented for service were actually rendered, and medically necessary. BWC has never instructed or trained Mrs. Salyer regarding her caregiver services or provided her with a job description.

BWC's payments to Mrs. Salyer are essentially insurance benefits to Mr. Salyer. *Cf. Savage v. Correlated Health Services, Ltd.*, (1992) 64 Ohio St. 42 3d, 591 N.E.2d 1216 (1992) (Workers' Compensation Benefits constitute "insurance" under O.R.C. § 2305.27 and do not reduce medical malpractice damages). Although Mrs. Salyer is paid directly by BWC, these payments are benefits which are provided to Mr. Salyer arising from his status as an injured worker under the Ohio workers' compensation laws. No legal relationship by contract or otherwise arises from the direct payment of these funds. O.A.C. § 4123-7-30 (A).

BWC maintains no separate employment information on Mrs. Salyer. Such information is maintained in Mr. Salyer's claim file and contains only records of the benefit payments. Mrs. Salyer is not a civil service employee and receives no vacation, sick leave, or personal leave. BWC does not deduct taxes or retirement payments from the payments made to Mrs. Salyer.

Mrs. Salyer's opportunity for profit is tied directly to the physical condition of her husband. If there is a change in Mr. Salyer's condition such that he requires skilled

nursing care, then Mrs. Salyer would not be able to perform these services. Moreover, Mr. Salyer selected Mrs. Salyer to be his caregiver among several alternatives. Mrs. Salyer, in turn, agreed to care for her husband rather than seek outside employment. Either person (not BWC) may decide to terminate this relationship.

It is clear from the statutory framework that BWC is, in essence, a government-managed insurance company. It is not in the business of providing health care services. Rather, it is the function of BWC to provide monetary benefits to injured workers so that they can obtain health care services. O.A.C. § 4123-9-01. Like any private insurance company, BWC monitors the payment of claims to the extent necessary to insure that the claimant is entitled to the benefits dispersed by BWC. Thus, Mrs. Salyer's services to Mr. Salyer do not form an integral part of BWC's business.

B. THE SERVICES MRS. SALYER PROVIDES TO MR. SALYER ARE COMPANIONSHIP SERVICES AND ARE SPECIFICALLY EXCLUDED FROM COVERAGE UNDER THE FLSA.

Pursuant to 29 U.S.C. §213(a)(15), the FLSA contains exclusions of certain employees from minimum wage coverage:

> Any employee * * * employed in domestic service employment to *provide companionship services for individuals who * * * are unable to care for themselves* (as such terms are defined in delineated by regulations of the secretary.)

(emphasis added). *Id.*

The U.S. Department of Labor regulations define companionship services as follows:

> 'companionship services' shall mean those *services which provide fellowship, care, and protection for a person who, because of * * * physical * * * infirmity, cannot care for his or her own needs.* Such services may include household work related to the care of the aged or infirmed person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: [p]rovided, however, that such work is incidental, i.e., does not exceed twenty percent of the total weekly hours worked. The term 'companionship services' *does not include services relating to the care and protection of the aged or infirmed which require and are performed by trained personnel, such as a registered or practical nurse.*

(emphasis added.) 29 CFR § 552.6.

Mrs. Salyer's services to Mr. Salyer clearly qualify as companionship services. She assists with (1) dressing, (2) putting on his shoes, support stockings, and brace, (3) taking his medications, (4) showering, and (5) assisting with his mobility. Although Mrs. Salyer performs other services which may be considered household services, *i.e.*, cleaning the bed, cooking, laundry and shopping, these tasks are specifically excluded for payment by BWC.

Mrs. Salyer performs services much like the companionship services provided in *McCune v. Oregon Senior Services Division*, 643 F. Supp. 1444 (D. Ore. 1986). She provides fellowship, care and protection for Mr. Salyer who has been unable to care for himself since his accident.

See, 29 CFR § 552.6. She received no formal training from BWC on how to perform her duties. She failed to present any evidence that these tasks require trained personnel and therefore, she does not fall within the "trained personnel" exception. *See*, *Cox v. Acme Health Services*, 55 F.3d 1304 (7th Cir. 1995); *Toth v. Green River Regional Mental Health/Mental Retardation Bd., Inc.*, 753 F.Supp. 216 (W.D. Ky. 1989); *Sandt v. Holden*, 698 F.Supp 64 (M.D.Pa. 1988); *McCune v. Oregon Senior Servs. Div.*, 643 F.Supp. 1444 (D.Ore. 1986), *aff'd*, 894 F.2d 1107 (9th Cir. 1990).

Accordingly, Mrs. Salyer's caregiver services fall within the definition of companionship services, and are excluded from the FLSA.

V. CONCLUSION

Respondents respectfully request the Court deny the petition for writ of certiorari in this matter.

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